UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-1894

ASSOCIATED STUDENTS OF WESTERN KENTUCKY UNIVERSITY, LINDA JONES, REGINALD GLASS, ALBERT STITH, PATRACK LONG, EDWARD JORDAN, CHARLES BOTELER, and MICHAEL FIROELLA,
Plaintiffs-Appellants,

v.

DERO G. DOWNING, President of the Western Kentucky University, CHARLES KEOWN, and the BOARD OF REGENTS OF WESTERN KENTUCKY UNIVERSITY, a Body Corporate,
Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Kentucky, Bowling Green Division.

Decided and Filed March 28, 1973.

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and KENNEDY, District Judge.*

PHILLIPS, Chief Judge. The governing officials of Western Kentucky University at Bowling Green made a decision that the sponsoring by the University of a certain motion picture film and its showing on the campus under University auspices would be inappropriate. Accordingly, the University cancelled the booking contract which it previously had executed for the showing of the film. District Judge Rhodes Bratcher, after a comprehensive evidentiary hear-

*Honorable Cornelia G. Kennedy, United States District Judge for the Eastern District of Michigan, sitting by designation.

ing, found that the decision of the University was within the rights and powers of its governing officials.

We affirm.

The appellants are Associated Students of Western Kentucky University, the student government organization, two of the officers of that organization and two other University students.

The appellee Board of Regents is the duly constituted governing body of the University. K.R.S. § 164.350. The President and Dean of Student Affairs also were named parties defendant.

Since about 1966 the University and the Associated Students have planned and operated jointly a series of cultural, social and educational programs for the benefit and enjoyment of students. The District Court held that the University is an indispensable party, both as to selection and content of the programs under consideration in the series. The programs are financed through an item in the University's budget, which in 1971 was set at a maximum of $52,000. All agreements in connection with the series required the approving signature of the University as a necessary contracting party.

A showing of "The Films of John Lennon and Yoko Ono" was scheduled on the campus on February 2, 1971. The University signed a booking contract for this program. After a preliminary showing of the film, the University cancelled the contract.

One segment of the film in question was titled "The Fly." Judge Bratcher described it as follows:

> "The Court has seen the questioned film in chambers and it has been described in the testimony. Briefly, it consists of a camera focused upon what appears to be an ordinary house fly as it crawls and meanders over, around, in, on and about the body of a nude female

> model lying in bed . . . on her back with her legs spread apart. The camera, on occasion, zooms in for close-up showings of the open vaginal orifice with the ever-present fly crawling in and around the exposed area.
>
> "The travels of the fly take it to the legs, arms, nipples of breast, ears, hair of the head, hair under the arms and substantially the entire body of the model, all accompanied by background music."

The Dean of Student Affairs concluded that: "It would be inappropriate for the University to continue as a contracting party." The President of the University concurred in this conclusion. There is no dispute that the making of this decision was within the scope of authority delegated by the Board of Regents.

The appellants sought declaratory judgment and injunctive relief to protect certain rights alleged to have been violated in derogation of constitutional guaranties. After a full hearing Judge Bratcher ruled that the University, as a party to the booking contract and pursuant to its terms, had the right to cancel the contract in the absence of a clear case of constitutional infringement.

We believe this case to be distinguished from situations where University officials have censored programs sponsored by students or student organizations or otherwise interfered with the exercise of First Amendment rights. *See, e.g., Brooks* v. *Auburn University,* 412 F. 2d 1171 (5th Cir. 1969); *Korn* v. *Elkins,* 317 F. Supp. 138 (D. Md. 1970); *Antonelli* v. *Hammond,* 308 F. Supp. 1329 (D. Mass. 1970). In the present case the University did nothing more than to make a determination that, with respect to a particular experimental film, it would be "inappropriate for the University to continue as a contracting party."

The evidence supports the conclusion of the District Court that appellants demonstrated no violation of any constitutional right. The findings of fact of the District Court are not clearly erroneous, but to the contrary are supported by substantial evidence. Rule 52(a), Fed. R. Civ. P. The University had the prerogative to determine, as it did, that it was inappropriate for it as an institution of higher learning to sponsor the showing of the questioned film as a part of its educational program.

Affirmed.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT BOWLING GREEN

No. 1559

ASSOCIATED STUDENTS OF WESTERN KENTUCKY UNIVERSITY, LINDA JONES, REGINALD GLASS, ALBERT STITH and PATRICK LONG - - *Plaintiffs*

v.

DERO G. DOWNING, President of Western Kentucky University, CHARLES KEOWN, and the BOARD OF REGENTS OF WESTERN KENTUCKY UNIVERSITY, a Body Corporate - - *Defendants*

MEMORANDUM AND ORDER—Entered June 5, 1972

This is an action by Associated Students of Western Kentucky University, Linda Jones, Reginald Glass, Albert Stith and Patrick Long against Dero G. Downing, President of Western Kentucky University, Charles Keown, and the Board of Regents of Western Kentucky University, a body corporate, defendants. The plaintiff, Associated Students, is the duly constituted and officially recognized student government association of Western Kentucky University. Linda Jones was President of Associated Students and by virtue of her office was an ex officio member of the Board of Regents. Reginald Glass was vice president, Albert Stith and Patrick Long were members of Associated Students Congress. All were full-time students at Western Kentucky University.

The defendant Board of Regents of Western Kentucky University is the duly constituted governing body of a state-supported institution of higher learning located in Bowling

Green, Kentucky, with co-educational enrollment of about 10,000 students ranging in age from 16 years upward. The defendant Board of Regents is organized under the provisions of KRS 164.350 and exercises plenary governing power over the University. The defendant Dero G. Downing is President of the University and the defendant Charles Keown is the Dean of Student Affairs and as such serves as adviser to the Associated Students. The plaintiffs in this action seek declaratory judgment and injunctive relief to protect certain alleged rights claimed to have been violated in derogation of constitutional guaranties.

The relevant facts are these:

Plaintiffs and defendants since about 1966 have jointly planned and operated a series of cultural, social and educational programs for the benefit and enjoyment of the students. While there is some disagreement as to facts, it is clear that the University was an indispensable party and directly involved in the decision-making process, both as to selection and content of the programs under consideration in the series.

The plaintiffs had no separate funds budgeted to it for its sole and exclusive use and benefit but depended upon the University to allocate funds to it from its overall budget where this could be accomplished for college approved activities and within the school's "established maximum level of expenditure" which, in 1971, was set at $52,000.00.

All agreements in connection with the series required the approving signature of the University as a necessary contracting party.

This pattern of procedure was understood by each of the parties hereto. In the past the University exercised these prerogatives without provoking any controversy until the present hostilities were ignited.

Plaintiffs scheduled "The Films of John Lennon and Yoko Ono" for showing on campus February 2, 1971. On February 1, Dean Keown, after his suspicions were aroused

from reading a distributor leaflet description as to one segment of the film referred to or titled "The Fly", viewed the film and subsequently refused to permit it to be shown on campus and stated the film was "gross" and it "would not be in the best interest of the University".

Keown decided after seeing the questioned portion that the film was "gross", "offensive", "lewd", "unrefined", "crude", "no educational value", "coarse" (adjectives he used at various times to describe the film) and that:

> "It would be inappropriate for the University to continue as a contracting co-sponsor."

He therefore decided to cancel as he had a right to do. Under the terms of the contract the University reserved the right to cancel.

The University, through its officials and governing body, supported the decision of Dean Keown and agreed that his judgment was sound, according to President Downing.

Negotiations with the Associated Students to delete "The Fly" were fruitless, notwithstanding the producer did agree. The University did not object to the Associated Students showing the film off campus in a non-university facility. When efforts to come up with some acceptable alternatives failed, the booking was cancelled by the University as recommended by Dean Keown.

The plaintiffs contend that the University's decision amounted to official censorship and violated the students' (1) right to receive information and (2) freedom of expression.

The Court has seen the questioned film in chambers and it has been described in the testimony. Briefly, it consists of a camera focused upon what appears to be an ordinary house fly as it crawls and meanders over, around, in, on and about the body of a nude female model lying in bed in a prone position on her back with her legs spread apart.

The camera, on occasion, zooms in for close-up showings of the open vaginal orifice with the ever-present fly crawling in and around the exposed area.

The travels of the fly take it to the legs, arms, nipples of breast, ears, hair of the head, hair under the arms and substantially the entire body of the model, all accompanied by background music.

The Bowling Green, Kentucky, Chief of Detectives Ashby and its Chief of Police Constance each described the film as "filthy" and stated that if it had been shown at a downtown commercial theatre it would have been illegal and an arrest justified.

"The Fly" was unrated. The advertising material distributed in connection with the film contained a warning that it was recommended "for mature audiences only". Apparently, at the proposed showing at Western it would not have been so restricted.

Mr. Skates, theatre manager at Bowling Green for the Martin chain of theatres, testified that unrated movies receive an automatic rating of "X". He stated that "The Fly" would not have been shown under their present policy.

Reginald Glass, Vice President of Associated Students testified that the film was an experimental film. He explained that by that he meant it was out of the ordinary—made by non-professionals—designed for mature audiences with knowledge of experimental films.

It is obvious that a college or university campus would be a convenient, exploitable outlet for a questionable film which is denied the normal commercial outlets by civilian law. However, no one has attempted to explain why the University officials should provide a testing place for such a film. Plaintiffs have made no effort to show that the film was entertaining, educational or morally uplifting, only that it was experimental. Many films no matter how offensive to good taste, could qualify if this was the sole requirement.

Certainly there was no great demand from the students that it be shown since only eight tickets had been sold in advance.

With this factual background we now proceed to a discussion of the applicable law as we conceive it to be.

This Court does have power to issue an injunction where university officials violate the constitutional rights of students. *Dickson* v. *Setterson*, 280 F. Supp. 486.

It is settled that university students do not discard secured constitutional rights upon entering a state-supported school. *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969).

This is not to say that all surrounding facts, circumstances and conditions must be either ignored or disregarded. It is equally well settled that no one has the right to say anything he wants to, and at any time, and on any occasion. *Schenck* v. *U. S.*, 249 U. S. 47.

We must recognize that First Amendment rights are not absolute. Regulation as to time, place and manner of the exercise of such rights is proper when reasonably related to a valid public interest. In the instant case the University was burdened with the administrative responsibility and clothed with the authority to regulate the conduct and behavior of its students, particularly if it tended to threaten achievement of its educational goals. The University had the inherent power to formulate rules it deemed appropriate to the maintenance of proper decorum and to prevent that which it regarded as a reckless display of impropriety. In doing so it should fairly consider the accepted norms of social behavior in the community. See *Sellers* v. *Regents of University of California*, 432 F. 2d 493 (1970, 9th Cir.).

In the academic community greater restrictions may prevail than in society at large, and the subtle fixing of these limits should in a large manner be left to the educational institution. *Goldberg* v. *Regents of University of California*, 57 Calif. Reporter 463.

In *Bright* v. *Nunn*, 448 F. 2d 245 (1971, 6th Cir.) it is held:

> "There can be no question of the right of the school official to prescribe and control conduct in the schools. This was recognized in Tinker, supra (at 507, 89 S. Ct. 733) and by us in Norton v. Discipline Comm. of East Tenn. State Univ., 419 F. 2d 195 (6th Cir. 1969) cert. denied, 399 U. S. 906, 90 S. Ct. 2191, 26 L. Ed. 2d 562 (1970)."

School officials must be given wide latitude in maintaining discipline and good order on campus and courts should not set themselves up as supreme boards of review in such matters.

The University obviously cannot surrender its responsibility and allow the students the rights to unbridled self expression. The University in this case was confronted with a very delicate situation, it acted promptly, decisively and reasonably. This Court does not believe it would be wise to interfere and grant the relief demanded by the plaintiffs. The school officials were clearly acting in utmost good faith and in an area where the school had a genuine and legitimate concern.

In *Epperson* v. *Arkansas*, 393 U. S. 97, 89 S. Ct. 266, our highest tribunal held that courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

A college has the inherent power to promulgate rules and regulations and courts should interfere only where there is a clear case of constitutional infringement. See *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077 (1969, 8th Cir.)

The Court is constrained to follow *Close* v. *Lederle*, 424 F. 2d 988 (1st Cir., 1970), which was an artist's action for

a declaration that a state university's removal of his painting from the university's art exhibit was in violation of his rights under the First and Fourteenth Amendments and for an order for reinstatement. The District Court directed reinstatement and upon appeal it was held that where the state university corridor in which art was exhibited was regularly used by the public, the university officials could consider such primary use by the public and even without complaints received, were warranted in finding that the plaintiff's paintings were inappropriate for exhibition therein and, accordingly, had a right to withdraw permission for their showing. This case holds that detailed codification of all rules and regulations are not necessary on campuses. In the instant case the plaintiffs has specific and actual notice that the University officials, and not the Associated Students, had the vested right to select the contents of such programs. The University was a full contracting party with concomitant rights and powers respecting booking arrangements for the film in question.

The Court feels that the University officials were acting at all times herein in absolute good faith and that their actions were not improper under the facts of this case and, in fact, consistent with the objectives of the Associated Student government of Western Kentucky University as set out in the preamble to its constitution which reads in part as follows:

> "To uphold and promote ideals, principles and objectives of the University; by the authority of the University."

Pursuant to the Federal Rules of Civil Procedure 65, all applications for injunctive relief and the trial on the merits are hereby consolidated. It is further ORDERED that this Memorandum and Order shall likewise constitute the Court's Findings of Fact and Conclusions of Law.

For the reasons hereinabove stated, it is the judgment of the Court that the plaintiffs' action be and same is hereby dismissed.

June 2, 1972

(s) Rhodes Bratcher
United States District Judge